No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES, PETITIONER

v.

GEORGE S. BUSH & CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals entered June 15, 1939, reversing a judgment of the United States Customs Court.

OPINIONS BELOW

The opinion of the trial court (R. 51–60) is reported in R. D. 4034, 71 Treas. Dec. 1291. The opinion of the Customs Court, appellate term (R. 63–75), is reported in R. D. 4253, 73 Treas. Dec. 1432. The opinions in the Court of Customs and Patent Appeals (R. 77–92) are reported in 104 F. (2d) 368.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 15, 1939 (R. 92–93). A petition for rehearing was denied October 2, 1939 (R. 93).

The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended (28 U. S. C., sec. 308).

QUESTIONS PRESENTED

Pursuant to Section 336 of the Tariff Act of 1930, the United States Tariff Commission conducted an investigation to ascertain the difference in the costs of production of canned clams in the United States and in Japan, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the duty on canned clams. The present suit was brought by an importer of canned clams, alleging the proclamation of the President to be void. The questions presented are: (1) whether the Customs Court has power to review the facts and the reasoning upon which the Tariff Commission based its recommendation to the President, and if dissatisfied to declare the proclamation void; and (2) if the court has such power whether the Tariff Commission erred in its method of ascertaining the Japanese cost of production of canned clams.

STATUTES INVOLVED

The relevant portions of the Tariff Act of 1930, c. 497, 46 Stat. 590, are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

On May 1, 1934, the President of the United States proclaimed that a change in the duty on canned clams was necessary to equalize the difference in the costs of production in the United States and in the principal competing country, Japan, and that the duty, which up

to that time had been at the rate of 35% ad valorem on *a foreign value basis,* as defined in Section 402 (c) of the Tariff Act of 1930, should be changed to 35% ad valorem *on the basis of the American selling price,* as defined in Section 402 (g) of the Act (R. 49–50). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1930 (R. 13). Section 336 (c. 497, 46 Stat. 590, 701), *infra,* p. 14.

The Commission instituted the investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams. Public notice of the hearing was given on the same date. The hearing was held on October 5, 1932, and interested parties were given an opportunity to be present, to produce evidence and to be heard (R. 21). As a result of its investigation the Commission found that the duty of 35% ad valorem on the foreign dutiable value fixed by the statute did not equalize the difference in the costs of production of the domestic article and the Japanese article and that the rate of duty necessary to equalize the difference, within the limits permitted by Section 336 (b) of Title III of the Tariff Act of 1930, was 35% ad valorem based upon the American selling price of the domestic article (R. 26). It accordingly recommended to the President this change in the basis of value (R. 21) and its recommendation was approved by the President in his proclamation of May 1, 1934 (R. 50).

In computing the Japanese costs of production the Commission, pursuant to the authority conferred upon it by Section 336 (e) (2) (A), *infra,* p. 16, accepted

as evidence of cost the weighted average of the invoice prices of Japanese canned clams entered at San Francisco, the principal port of entry, for a representative period. The period considered as representative extended from December 1, 1930, to September 30, 1932 (R. 36). Since, however, the invoice prices were in terms of Japanese yen it was necessary, for purposes of comparison with domestic costs, to convert the Japanese costs so determined into terms of United States dollars. This was done at the average rate of exchange for 1932 (R. 24). The reason that the 1932 rate of exchange was used was that Japan went off the gold standard on December 13, 1931, and the value of the yen in terms of United States dollars declined steadily from that date until November 1932, when it was worth only $0.2062 as against its par value of $0.4985 (R. 39). After that time the yen increased somewhat in value (*id.*), but at the time of the Commission's report to the President the prevailing rate of exchange was not much higher than the average rate for 1932 (R. 24). With respect to this matter the Commission found as follows (R. 24):

> 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the

present or probable future invoice values in terms of dollars. The commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

After the President issued his proclamation, the respondent imported some canned clams and they were appraised, pursuant to the proclamation, on the basis of the American selling price. The importer filed an appeal for reappraisement with the United States Customs Court, pursuant to Section 501 of the Tariff Act of 1930. At the trial he contended that the proclamation changing the basis of value was invalid and that the proper basis for appraising the merchandise was the foreign value as defined in Section 402 (c). It was admitted that the Commission had proceeded properly in ascertaining the foreign and domestic costs and that the period selected as representative for determining the weighted average of invoice prices was proper. The validity of the proclamation was challenged solely on the ground that the Commission had no legal authority to use one period to ascertain the weighted average of invoice prices in Japanese yen and another period to ascertain the rate of exchange for converting the yen into United States dollars.

The judge of the Customs Court sitting in reappraisement sustained the appraised value, holding that the matters complained of concerned merely the internal

fact-finding processes of the Tariff Commission and the President and that these matters were not justiciable (R. 51–60). On appeal to the appellate division of the Customs Court the judgment of the single judge was affirmed (R. 63–75). On appeal to the Court of Customs and Patent Appeals the judgment of the Customs Court was reversed, two judges dissenting (R. 77–92).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the Customs Court had no power to review the facts or the reasoning upon which the Tariff Commission based its recommendation to the President for an increase in the duty on canned clams.

2. In holding that Section 336 (e) (2) (A) of the Tariff Act of 1930 prohibited the Tariff Commission from using a different period for ascertaining the proper rate of exchange at which to convert Japanese yen into terms of United States dollars from the period selected as representative in determining the weighted average of the invoice prices of the Japanese canned clams.

3. In holding that the provision of Section 336 (e) (2) (A) that the Tariff Commission may accept as evidence of the cost of production of a foreign article "the weighted average of the invoice prices or values for a representative period" should be construed to require the Commission to ascertain the invoice prices in United States currency for that period.

4. In holding that the investigation made by the Tariff Commission was illegal and that the proclamation

by the President, based upon such investigation, was illegal and void.

5. In holding that the conversion of currency is involved in finding the basic cost of production of a foreign article.

6. In reversing the judgment of the Customs Court.

REASONS FOR GRANTING THE WRIT

The question decided by the Court of Customs and Patent Appeals is one of first impression. Although there is, therefore, no conflict of decisions, the decision below, if allowed to stand, will in large measure destroy the usefulness of the flexible tariff provisions of the Tariff Act of 1930 by prohibiting prompt and effective changes in tariff duties to offset changing trade conditions caused by foreign currency fluctuations. The question cannot well arise in courts other than the Customs courts. Consequently there is involved a question of federal law of large public importance which has not been, but should be, settled by this Court.

1. Both the judge sitting in reappraisement and the appellate division of the Customs Court held that the action of the Tariff Commission in converting the weighted average invoice prices of the canned clams from yen into dollars at the average rate of exchange for 1932 was not subject to judicial review. They pointed out that the necessary prerequisites to the issuance of a proclamation by the President—i. e., an investigation by the Tariff Commission, a public hearing and notice thereof to all interested parties, and a report by the Tariff Commission to the President—were conceded to exist. These jurisdictional requisites

being established, they believed that it was not within the power of the court to review the facts and reasoning upon which the Commission based its recommendation to the President or upon which the President based his approval of that recommendation.

The court below did not expressly discuss this question of jurisdiction. It held merely that the statute prohibited the Commission from using a different period for ascertaining the rate of exchange for conversion purposes from the period selected as representative in determining the weighted average of the invoice prices, that because the Commission had used such a different period in violation of the statute its investigation was "illegal," and that, therefore, "the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void" (R. 86).

We have found no authority for the proposition that if the Tariff Commission follows an erroneous method for ascertaining foreign costs of production its investigation is therefore "illegal," and a necessary jurisdictional prerequisite to the issuance of a proclamation by the President is lacking. That the court's holding is erroneous we believe to be well illustrated by the present record. The Commission's report sets forth all of the relevant facts. It details the imports of Japanese canned clams for the period from December 1, 1930, to September 30, 1932, conceded by respondent to be representative, the dutiable value of the merchandise in Japanese currency, and the dutiable value of the merchandise converted into United States currency both at the prevailing rate of exchange at the date of export and at the average rate of exchange for the year 1932

(R. 37). No provision of law required it to set forth the reasoning by which it drew its conclusion from these facts; that it did set forth its reasoning, and that that reasoning, in the view of the court below, was based upon an erroneous interpretation of the statute, does not invalidate its investigation or its recommendation, much less the proclamation of the President. Indeed, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report.

This Court has held that what is done by the Tariff Commission and the President in changing tariff rates to conform to new conditions is in substance one stage of the legislative process. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 305. In that case the Court pointed out (p. 318) that no one has a legal right to the maintenance of an existing rate or duty, and that the action of the President in exercising his delegated power to change the duty is not subject to impeachment "if the prescribed forms of legislation have been regularly observed." Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed. That being so, there can be no judicial review of the legislative judgment reached by the Commission and the President, and *a fortiori* no review of the facts and the reasoning on which that judgment was based.

2. The court below in terms construed Section 336 (e) (2) (A) as though it read "the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period*" (R. 82), and held that the Commission, in finding the Japanese cost of the article, was obliged to convert such cost from Japanese yen into United States dollars at the average rate of exchange for the representative period used by the Commission to ascertain the invoice prices of the article. This holding has no warrant in the provisions of the Tariff Act of 1930 and, to a very large extent, nullifies the intention of Congress in enacting the flexible tariff provision.

The purpose of the flexible tariff provision is to permit prompt changes in the amount of duty payable on imported merchandise in order to meet changing conditions of commerce, and the legislative history of the provision shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a flexible tariff law. H. Rep. No. 248, 67th Cong., 1st Sess., part 1, p. 20; S. Rep. No. 595, 67th Cong., 2d Sess., pp. 6–7; 62 Cong. Rec. 37; *id.*, part 12, p. 12508. Under the decision of the court below, the provision is rendered largely useless for this purpose.

The facts of the present case illustrate the point. The need for a change in the duty on canned clams arose primarily from the fact that Japan went off the gold standard on December 13, 1931. By June 1932, when the Commission instituted its investigation, the yen had greatly depreciated in terms of United States dollars,

thereby greatly increasing the difference, in terms of dollars, between the Japanese and domestic costs of production. In order to determine the Japanese cost of production by use of weighted-average invoice prices, the Commission was required to use invoice prices over a period extending for a considerable time before the start of its investigation, when the exchange rate of the yen was substantially higher than it was in 1932. If the Commission were required, as the court below held, to convert the invoice prices into terms of United States currency at the prevailing rate on the date of exportation, the difference between the Japanese costs of production, so determined, and the domestic costs of production would not reflect the depreciation in the value of the yen—the very fact necessitating the change in duty. The only way in which the conversion could be made so as to reflect the difference in the costs of production at the time of the Commission's investigation was by means of the method actually used—i. e., to determine the Japanese costs of production in yen over a representative period and then to convert those costs into dollars at the average rate of exchange prevailing at the time of the investigation.

There is nothing arbitrary in this method of ascertaining costs. Depreciation of the currency of a country in terms of foreign exchange has, at least over limited periods of time, a relatively small influence upon the domestic value of that currency and upon the domestic costs of production, expressed in terms of that currency. See, e. g., Edie, *Dollars,* pp. 94–95. Thus the Commission was fairly entitled to assume that, despite the fact that Japan went off the gold standard

on December 13, 1931, the weighted average invoice prices of the Japanese canned clams for the 22-month period which it took as representative accurately reflected the Japanese cost of production, in yen, at the time of its investigation. But in order to determine the Japanese costs of production, in dollars, at the time of its investigation, it was required to convert the yen into dollars at the average rate of exchange then prevailing. Had it made the conversion at the rate prevailing during the 22-month period of importation it would have been using a rate which had merely an historical interest and which did not represent conditions as they actually existed at the time that action under the flexible tariff provision was being considered.

It is clear that under the decision below the Commission and the President will be prevented from making such prompt modifications of tariff duties as are necessary to offset changes in the value of foreign currencies. In a case where the value of the currency of a given country has undergone a sudden and material change, an investigation in which the old rate of exchange is applied as the conversion factor would in most cases show little or no need for equalization, even though the depreciation of the foreign currency quite obviously made equalization highly necessary. The foreign article would therefore enjoy an advantage in competition with the domestic article which the Commission and the President would be powerless to prevent until another investigation could be made. And, even then, a further fluctuation of the foreign currency might produce a similar result at the end of the later investigation. Thus, under the decision of the court

below, the Commission and the President are effectively prevented from carrying out the intention of Congress in enacting the flexible tariff provision in almost every case where currency fluctuation is a major factor.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

APPENDIX

Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C., Title 19, Sec. 1336):

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds

shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date of Rates and Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds it practicable:

(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other

costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period, and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification of Changes in Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers from the Free List to the Dutiable List or from the Dutiable List to the Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is, pro-

vided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules and Regulations of President.—The President is authorized to make all needful rules

and regulations for carrying out his functions under the provisions of this section.

(j) Rules and Regulations of Secretary of Treasury.—The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at the time of entry.

(k) Investigations Prior to Enactment of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section.

* * * * * *

SEC. 402. VALUE.

* * * * * *

(d) Export Value.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses inci-

dent to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

(g) American Selling Price.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.